**DISPUTE REVIEW BOARD REPORTAND RECOMMENDATION**

**I-25/US 24 Bridge Repairs**

**El Paso County, CO**

**CDOT PROJECT NO. BR 0252-422**

**DISPUTES BY SUBCONTRACTOR CONCERNING TRAFFIC CONTROL PAYMENT**

**Hearing Date:** May 21, 2014

**Hearing Location: CDOT** Resident Engineer Office 1480 Quail Lake Loop – Suite A Colorado Springs, CO

**Hearing Attendees:** Al Hood - ABCO Contracting - President Ken Kochevar - ABCO Contracting - Construction Manager Greg Parker - Parker Excavating - Vice President Stacie Parker - Parker Excavating Elliot Fladen - Parker Excavating - Outside Attorney Doug Lollar - CDOT - Region 2 North Program Engineer Mark Andrew - CDOT - Resident Engineer Shane Ferguson - CDOT - Project Engineer Ted Tjerandsen - CDOT - Assistant Project Engineer (Wilson & Co.) Kathy Young - CDOT - Assistant Attorney General

**Background**

ABCO Contracting, Inc. (Contractor) was awarded a Contract by CDOT for $1,736,500.50 for bridge repairs consisting of the removal and replacement of expansion joints and bridge railing on 16 bridges on I-25 and US 24 in Colorado Springs, CO. A Notice to Proceed was issued on December 24, 2012. Work began on the Project on March 4, 2013. Parker Excavating, Inc. (Subcontractor) performed the Traffic Control work.

Section 7 of the Contract incorporates the Plans, the Standard Specifications for Road and Bridge Construction dated 2011 and any Special Provisions for this Project and Revised Standard Special Provisions.

The Subcontractor submitted a Request for Equitable Adjustment (REA) (Pass Through) on December 10, 2013 to the Contractor who forwarded it to CDOT on December 16, 2013. The REA was for extra labor and equipment for Traffic Control. In a letter dated December 20, 2013, the CDOT Project Engineer found the Subcontractor’s dispute did not have merit. On January 17, 2014, a meeting was held with the CDOT Resident Engineer. In a letter dated February 5, 2014, the CDOT Resident Engineer found the Subcontractor’s dispute did not have merit. In a letter dated February 6, 2014, the Subcontractor requested the disputes proceed to a DRB.

**Statements of Dispute**

CDOT submitted the following Statement of Dispute.

Dispute #1 - Parker Excavating is claiming $16,021.82. They believe they are due these funds for time changes in nightly lane closures.

Dispute #2 - Parker Excavating is claiming $28,662.51. They are claiming this due to the use of drum channelizing devices on the project.

Dispute #3 - Parker Excavating is claiming $6,057.97. They are claiming this due to equipment not being utilized on the project.

Dispute #4 - Parker Excavating is claiming $68,557.50. They believe their equipment was on site longer than the original contract length.

The Subcontractor submitted the following Statement of Dispute.

Parker has set forth four claims for additional compensation for costs and expenses incurred as a result of directives or changes made by CDOT at variance with the original scope of PEI’s contract as bid. The claims and materials have been reviewed by an outside engineer, Sage Consulting Group, which prepared the statement and exhibits that accompany the initial advisement letter dated October 16, 2013, which was resubmitted as an REA on December 10, 2013 at the request of CDOT’s Shane Ferguson (“Claim Letter”). That letter and the attachments to it comprise PEI’s basis for each of its claims.

**Pre-hearing Submittal**

A binder of Common Reference Documents consisting of the Contract, Plans and Specs, and correspondence related to the disputes with attachments was provided.Both parties provided the DRB with Pre-hearing Submittals per Spec. Section 105.23(e) which included, but were not limited to, Position Papers, documentary evidence relevant to the issues, serial letters, e-mails, speed memos, and Standard Plans for Traffic Control. Both parties provided the DRB with their lists of attendees.

**Additional Document Discussions**

Prior to the hearing presentations, the DRB heard from the parties on objections to information contained in Pre-hearing Submittals or added documents brought to the hearing.

1. The Subcontractor objected to Exhibit 5 in CDOT’s Pre-hearing Submittal - Weekly Time Count Reports No. 11 and No. 52 because they had not seen the documents during the initial dispute discussions. The documents were allowed since they record the Project time and are a part of CDOT project field management procedures as discussed in Spec 108.08(a).

2. The Subcontractor requested to use the CDOT email dated February 13, 2013 concerning VMS Boards. CDOT had no objection.

3. CDOT objected to Speed Memo #10 that was contained in the Subcontractor’s Pre-hearing Submittal since it had not been included in in the initial dispute discussions. Also, the attachments to the Speed Memo were not included in the Subcontractor’s Pre-hearing Submittal. CDOT agreed that if the Speed Memo is used in the hearing, all of the attachments must be included because the Speed Memo itself could be taken out of context.

4. During the hearing, the Subcontractor handed out and referenced various sections of the Manual on Uniform Traffic Control Devices (MUTCD) which were not in the Subcontractor’s Pre-hearing Submittal. CDOT said they had no objections to their use provided it was the 2009 Edition.

**Dispute #1: Extra Labor Cost – Change in Shift Times**

**Subcontractor Presentation on Extra Labor Cost – Change in Shift Times**

The Subcontractor called attention to Page 24 of the Special Provisions which lists the hours that no work could be performed on the Project and when closures down to one lane were not allowed. CDOT changed these periods but has stated that Traffic Control Management (TCM) and Traffic Control Supervisor (TCS) are for a 24 hour period. They bid 10 hours per day for the TCS which included 1½ hours for admin and setup. The amount requested in the REA, has been reduced for any amounts that they had been paid by the Contractor.

CDOT has said they did not give any written directive to change the specs. Speed Memo #12 dated March 13, 2013 said barrels could start being set at 7:30 p.m. and that they had to meet with Uniformed Traffic Control (UTC) at 6:45 p.m. CDOT said the UTC was for safety. The UTC was not in the Contract and worked for CDOT.

The Meeting Agenda for the meeting on June 18, 2013 under Traffic Control changed the UTC meeting to 7:00 p.m. CDOT said the earlier start for lane closure was for the convenience of the Contractor but the Subcontractor did not agree with the convenience.

**CDOT Presentation on Extra Labor Cost – Change in Shift Times**

CDOT said that per Spec 630.11(10) the TCM is for a 24 hour period and the TCS shall be on the work site at all times when TCM is performed. The change in the start time for lane closures was requested by the Contractor. The UTC meeting at 6:45was to get the Traffic Control plan in place prior to starting the closure.

The Project was a bridge maintenance project to replace the bridge expansion devices on 16 bridges and the bridge rail on one bridge. The work was on I-25 and the US 24 Expressway and the work had to be done at night. Coordination was needed to make the Project successful. The UTC is referenced in Traffic Control Plan Special Provision and is also listed in the Force Account Items.

Spec 630.15 – Method of Measurement, states, *The quantity to be measured for TCM will be the number of authorized 24-hour days of active TCM performed by the TCS…*

At the June 18, 2013 meeting, the Subcontractor did not note an objection to the meeting with the UTC. CDOT, the Contractor and Subcontractor all agreed that the UTC meeting was to layout and install the Traffic Control Devices per the approved MHT. The cost of the Force Account for the UTC that CDOT picked up the costs for is shown in the Special Provisions on Page 22. Due to State of Colorado requirements, CDOT is the only one who can contract with the State Patrol.

The TCM/TCS requirements and payment are defined in the Contract and the additional payment requested by the Subcontractor is included in the 24 hour pay period.

**Subcontractor Rebuttal on Extra Labor Cost – Change in Shift Times**

CDOT said the UTC was in the Force Account Items but they did not see what was in the agreement for the UTC. CDOT said the UTC was to facilitate getting the crews on the road. Why did they have to meet the UTC at offsite locations? How did meeting the UTC before the closures started help the Contractor and Subcontractor?

They wanted to meet the UTC on site. There is nothing in the Force Account Special requiring coordination with the UTC.

**CDOT Rebuttal on Extra Labor Cost – Change in Shift Times**

The use of UTC was planned from the beginning of the Project. Meeting on site was not safe since the work was on I-25. SPEC 630.11 says the TCS is required to coordinate all traffic control operations and coordinate with police agencies. This is the same on all CDOT jobs when the State Patrol furnishes the UTC.

The Contractor requested the earlier start time. This was a cooperative effort to make the job safe and successful. CDOT picked the first site for the UTC meeting and then the Subcontractor was to coordinate the meeting site with the UTC. The Subcontractor never stated an objection to the time and location of the meeting with the UTC until late in the Project.

CDOT’s Contract is with the Contractor but the TCS duties are in the Contract.

**Subcontractor Presentation on Quantum for Extra Labor Cost – Change in Shift Times**

REA Exhibit A-1, lists all the days and hours worked and A-2 lists all the hours over 8.5 hours per day. The Contractor paid for an additional 91 TCS hours. Exhibit B-1 shows the extra labor costs. The TCS should be reduced 91 hours for a new total of 118 hours and an amount of $3,470.38. This results in a new total for Dispute #1 of $13,344.51.

**CDOT Presentation on Quantum for Extra Labor Cost – Change in Shift Times**

Since CDOT believes there is no merit in the dispute, there should be no quantum. There should be no added costs for the laborer since the laborer was not required to meet with the UTC, only the TCS.

The Contract is clear on how TCM and TCI are paid by CDOT. This is how CDOT paid the Contractor. The labor is not paid as a separate item but is included in the Unit Prices. The Contractor says they have paid the Subcontractor for the extra hours over 10 hours per day for the TCS.

CDOT heard nothing from the Contractor or Subcontractor about extra compensation until the job was almost over.

**Subcontractor Rebuttal on Quantum for Extra Labor Cost – Change in Shift Times**

The justification for the extra costs has not changed from the REA. The Position Paper corrects the costs paid by the Contractor.

**CDOT Rebuttal on Quantum for Extra Labor Cost – Change in Shift Times**

CDOT questioned the extra hours for setup since the Subcontractor included 10 hours in its subcontract. The Contractor requested the earlier start time.

The Subcontractor should put all the costs in its bid to comply with the Contract requirements.

**Discussion**

The Contractor said CDOT paid for all shifts on the job and it paid the Subcontractor those shifts plus TCS hours over 10 hours. The Contractor said the Subcontractor said nothing about extra time for the UTC coordination or meeting the UTC at the job.

CDOT said the meeting with the UTC was to be 15 minutes before the start of traffic control set-up and the TCS agreed with CDOT and the Contractor. There was only day when the Subcontractor disagreed with the location for the UTC meeting.

The Subcontractor said they did not disagree with the UTC coordination but CDOT said where to meet. The UTC had to follow their truck and they were not allowed to start if the UTC was not there. The Subcontractor said they did complain. Their subcontract does not include meeting with the UTC. The early start was requested by the Contractor. For safety, advance work was required before the work started. They should be compensated for the added TCS time and the TCS truck.

The Contractor said there was never a disagreement from the Subcontractor on time.

The Subcontractor said they could not start taking a lane until CDOT gave the OK. They had two crash trucks and the UTC for safety. They said they got the best TC Score but CDOT said it was a good score.

CDOT said the Subcontractor started placing signs at 7:00 for lane closures starting at 7:30. Spec 630.11 lists the TCS duties and some of these duties are at times other than the work hours. The lane closure times are in the Contract and the Contractor requested he time be changed.

The Subcontractor said one time they had met the UTC at 6:45 but the closures were not allowed to start until 8:00. The UTC could just have followed them at the ramp where they were staged. The UTC left when he wanted to.

CDOT said it never received documentation on delays. CDOT has the Subcontractor’s daily reports. CDOT allowed lanes to be taken when the traffic was reasonable. There were times when the second lane had to wait because of traffic.

**Questions from the DRB**

1. To Both: Do the days shown on Subcontractor’s Exhibit A-1 agree with TCM/TCS days?

The Subcontractor said they did.

CDOT pointed out that the TCS had to attend Project meeting per the specs and this is shown on some of the Subcontractor’s daily reports. The laborers did not have to be there at that time. CDOT does not direct the laborers’ times. CDOT asked the Contractor if CDOT at any time did not allow any closures per the specs and the Contractor said it did not know of any. There were times when they could not start on the middle lane until bot lanes could be closed.

2. To Both: Was a Notice of Change ever given or received?

CDOT said the first they knew of an issue was when the Subcontractor first submitted its claim in October 2013.

The Subcontractor said they did give notice but don’t have any written documentation.

**Dispute #2: Extra Labor Cost – Daily Setup and Takedown**

**Subcontractor Presentation on Extra Labor Cost – Daily Setup and Takedown**

The Subcontractor said an important point is that if *Road Work Ahead* signs could not be left in place, the drums could not have been left on the road per MUTCD but CDOT did allow some drums to remain on the Project. The *Road Work Ahead* signs were speced out with beacons which meant they were to remain in place. This was the wrong application. The M & S drawings don’t agree with the inspector’s position. They were allowed to slide drums to the clear zone or pick them up. They could have turned or masked the signs and slid the drums to the edge of the roadway or the edge of pavement.

For safety, they had to add a laborer to pick up or move the drums. M & S Sheet 3 of 20 calls out drums to be used for the taper but cones or vertical panels could have been used for the rest. The Subcontractor said CDOT said vertical panels could be used but that would require new MHT’s. CDOT changed the scope by requiring drums for everything. The Subcontractor did request the change in the beginning and a test was done at Woodman Road. They spent $2,400 to buy new spring sign stands. They bid one TCS and one laborer but needed 3 people on the truck.

**CDOT Presentation on Extra Labor Cost – Daily Setup and Takedown**

The Project was bid using all drums because of the traffic and safety on I-25 and US 24. The workers were adjacent to the traffic and the drums are more formidable than cones. There were 16 structures to be completed in 150 Work Days which meant the sites were being moved about every 10 days. No Temporary Barrier would work for this application. Cones were not applicable for safety and work at night. MUTCD 6G.04 allows modifications for special needs.

CDOT allowed the drums to be moved to the clear zone where a clear zone was available but they had to be moved to the clear zone for the safety of the traveling public. Spec 630.16 addresses the payment for the drums and CDOT paid per the Contract. The bid sheets called for drums and there are no cones listed.

With the exception of some discussions, CDOT did not hear about the removable signs or the Subcontractor’s desire to use permanent signs until near the end of the Project. There was a change of method for the installation of bridge expansion devices but the Traffic Control never changed. The signs were not needed during the day and, per MUTCD, the signs should be removed when not needed.

The Subcontractor approved and signed the MHT’s. The Form 205 submitted by the Contractor for the Subcontractor’s work shows drums. There was a lack of understanding by the Subcontractor about the Contract requirements. CDOT enforced the Plans and Specs unless there was an agreement to change. Speed Memo #17 allowed the use of cones for the installation of the expansion device glands since the operation moved from one side of the structure to the other as the gland was installed. A reverse snake was used to close the 2 lanes and it took about 4 hours. Also, the operation was done in the middle of the night. MUTCD 6G.02.09 covers work in short durations.

CDOT abided by the spec and paid by the spec.

**Subcontractor Rebuttal on Extra Labor Cost – Daily Setup and Takedown**

The Subcontractor said permanent sign were brought up at the pre-construction conference. Speed Memo #16 dated March 19, 2013 directed the use of drums. Speed Memo #17, 2 days later, said cones could be used for the gland installation. Speed Memo #35 addressed the use of vertical panels at no additional cost and required revised MHT’s. MUTCD 6F.67 says drums are used when they will remain in place for a prolonged period of time. The drums were moved daily. Work at each site lasted 7 to 10 days.

The Subcontractor agreed that drums were speced but this does not agree with MUTCD. They were paid for 150 drums but 250 were used. The Contractor said they paid the Subcontractor for the drums CDOT paid for on January 27, 2014.

The *Road Work Ahead* sign had to be considered permanently installed since the beacons were called for. The Subcontractor agreed CDOT allowed some drums to be left on the side of the road but MUTCD calls out 15 feet for the shoulders but CDOT said the clear zone was 18 feet.

**CDOT Rebuttal on Extra Labor Cost – Daily Setup and Takedown**

The Subcontractor claims picking up the drums caused extra labor. CDOT allowed the drums to be moved to where they were safe which is in the clear zone. This was shown on the MHT’s. The drums had to be picked up where they were a danger to the traveling public.

Spec 630.16 addresses payment for traffic control devices – First use is 50%, an additional 40% when the work is 75% complete and 10% when the Project is complete. Form 7’s identified the use and then CDOT paid for what was used.

Signs could have been masked or turned but the Subcontractor never made the request. Moving permanent signs 17 times seems very expensive compared to just picking them up. MUTCD 6B.01.09 says the devices should be removed when they were not needed and they were not needed during the day.

The drums on the bridges had to be moved because there was no safe place to put them. The clear zone is defined as 18 feet. There were some sites where the drums had to be removed. Plan Sheet No 8 calls out *Drum Channelizing Devices* and Note 2 shows it was CDOT’s plan to remove the devices at the end of each working day.

**Questions from the DRB**

1. To CDOT: Could permanent signs have been used and then masked or turned?

CDOT said the signs would have been inside the clear zone so they had to be moved.

2. To CDOT: Was a Notice of Change ever received?

CDOT said the first they were aware of a change was when the Subcontractor submitted its October 2013 letter.

3. To Both: How many drums were paid for?

The Subcontractor said the Plans called out 240.

CDOT said they paid for the maximum in use at any one time.

4. To CDOT: Where is the clear zone defined?

CDOT said it was defined in the Design Manual. MUTCD Page 12 #32 and #33 also defines it.

**Subcontractor Quantum Presentation on Extra Labor Cost – Daily Setup and Takedown**

The Subcontractor said they used the Force Account rate which was approved by CDOT. The hours are shown on Exhibit B-2 of the REA and total 1,096.5.

**CDOT Quantum Presentation on Extra Labor Cost – Daily Setup and Takedown**

CDOT maintains there is no merit in the dispute. The payment for devices should include the labor as detailed in the spec basis of payment. The Subcontractor’s list for Laborer 1 and Laborer 2 implies one laborer to do the work. Spec 630.16 indicates how devices are paid for and CDOT paid the Contractor per the specs.

CDOT paid for additional devices as extra work. The labor and equipment payment was negotiated.

The drums had to be picked up or moved, as well as, the signs.

**Discussion**

The Subcontractor said they agreed on the equipment and labor but not the devices.

CDOT said they paid when devices were used. I-25 required 88 drums each night and more drums were added when there was work on US 24. The sign quantity never exceeded the Plan quantity. CDOT paid the Contractor for 240 drums.

**Dispute #3: Overhead and Profit on Flashing Beacons**

**Subcontractor Presentation on Overhead and Profit on Flashing Beacons**

Spec 104.02(c) does not apply because the item is not a major item. The Subcontractor bid 22 beacons which were never used and were eliminated from pay items. They are asking for the overhead and profit that they included in their bid for the beacons since their total overhead and profit was spread over all their bid items.

**CDOT Presentation on Overhead and Profit on Flashing Beacons**

CDOT chose not to use the beacons per the Contract. CDOT offered to pay the Subcontractor for overhead related to the purchase of the beacons and for restocking charges. The Subcontractor has never submitted proof of purchase for this job or overhead costs.

The Contract does not allow for the payment of profit per Spec 109.03 – Compensation for Altered Quantities. The Subcontractor has never furnished an invoice to CDOT showing the beacons were purchased for the Project. The only thing the Subcontractor has furnished is a price quote. CDOD will provide compensation but they need proof first.

**Subcontractor Rebuttal on Overhead and Profit on Flashing Beacons**

Spec 109.03 covers Altered Quantities. In this case, CDOT eliminated all the beacons. The Subcontractor said it did not purchase the beacons for the Project. CDOT is saying that no use means no payment for the overhead they included in their bid. They also want the anticipated profit for the job that was included in the beacon Bid Item.

**CDOT Rebuttal on Overhead and Profit on Flashing Beacons**

The Subcontractor has never shown how they are out money for not using the beacons. Paying the Subcontractor for the anticipated overhead and profit included in the Bid Item would set a new precedent for CDOT payment.

**Discussion**

The Subcontractor said it moved 22 flashing beacons to the job before CDOT eliminated them. The quote that was included in the REA was to show the cost of the beacons containing the power source rather than an external battery which would not work on this Project.

CDOT said Spec 109.05 allows for payment for mobilization of materials and equipment that are eliminated. CDOT would need proof of the mobilization and equipment ownership if they will pay anything.

**Dispute #4: Extra Days on Site for Equipment**

**Subcontractor Presentation on Extra Days on Site for Equipment**

The Subcontractor said all parties agree on 150 days for TCM and 161 days for TCI but the equipment was on site or utilized for 312 days. Since the equipment was there, they should be paid for it. CDOT has said there are more calendar days than the 150 working days in the Contract. The equipment was on site for 101 days that were not paid. The equipment had to be there in case of an emergency.

The Subcontractor built an extra 90 days into the bid. The Variable Message Boards were used throughout the duration of the Project. They want to get paid for the equipment for all days it was on the Project.

**CDOT Presentation on Extra Days on Site for Equipment**

The Contract awarded to the Contractor was a 150 Working Day Contract. Six additional days were added by change order but were not used. There were 60 TCI days in the bid. Spec 630.16 defines how traffic control devices are paid for.

There were compensable and non-compensable delays due to weather and the fire. During the Contract period there were 150 days when work was performed, 43 days that were unworkable due to weather, and 95 days where there was no work for weekends, holidays and no work days as stated in the Contract. CDOT paid if the TCS mobilized. CDOT paid for traffic control when work started but was suspended due to the fire. The only compensable delay was due to the fire since it was out of the control of the Contractor.

The VMS Boards had to be on the job 7 days prior to the start of work and CDOT issued a Speed Memo on this.

**Subcontractor Rebuttal on Extra Days on Site for Equipment**

Spec 630.11 says TCM or TCI is paid for by calendar day. The Subcontractor agreed there were 150 Work Days and 60 days were in the bid for Traffic Control Inspection. 101 days should be added for the TCI days the equipment was on site. Equipment should be separate from TCI.

**CDOT Rebuttal on Extra Days on Site for Equipment**

CDOT compensated the Contractor per the Contract and for the compensable delay. The schedule was prepared by the Contractor and the start date was discussed at the pre-construction conference. There is nothing that the Subcontractor is asking for that CDOT is required to pay for per the Contract. The fire delay was the only compensable delay because the fire could not have been forecast. Total duration of the Project was 311 calendar days vs. 210 days that were estimated at the bid.

CDOT does not pay for delay unless it is Owner caused. There is no merit to the Subcontractor’s claim.

**Discussion**

The Subcontractor said it had discussed Force Account work. They want to be paid for the overtime for their equipment. CDOT had said they would be paid for days over 210. CDOT told them that the equipment had to stay on site.

CDOT said that they would have added payment if the time had gone over 150 days. At most sites there was one Message Board. CDOT wanted the equipment on site if it was going to be used. If it was on the MHT, it had to be on site. CDOT did not tell the Subcontractor that no equipment could be removed from the job or direct that non-used equipment remain on site.

The Subcontractor said they wanted to remove some of the VMB’s but CDOT said they wanted all 4 VMB’s left since they were going to be required for the work at US 24. CDOT also wanted the VMB’s available in case there was an emergency. Traffic Control has 45 minutes to respond to an emergency and if the equipment was not on the site, the time period could not have been met.

**Subcontractor Summary**

Dispute #1: There was no directive in the specs to change the hours. Traffic Control is for 24 hours whether TCM or TCI. CDOT directed the work hours and they performed but there is no evidence the Subcontractor agreed with the change.

Dispute #2: CDOT in misinterpreting the M & S Drawings and is misreading the MUTCD. They had to add labor to move the drums further than the side of the road. The MUTCD does not say that CDOT can give direction that places their people in danger to make the road safer for the traveling public. Moving the drums could not be done safely with only 2 people on the truck.

Dispute #3: CDOT said they would pay for the mob of the beacons. The spec doesn’t apply. Nowhere in the spec does it say no payment for OH&P. To use the beacons, the signs would have to have been installed permanently.

Dispute #4: This is a case of unjust enrichment. The spec says they are a subcontractor. The spec says every day is a work day for Traffic Control. Work day or calendar day, they should be paid for their equipment.

**CDOT Summary**

CDOT is governed by the Contract and Specs and the Specs define what they can do.

Dispute #1: Spec 630.15 defines the Method of Measurement for TCM and TCI and Spec 630.16 says how the items are paid. CDOT paid for the Unit Price items per the Contract. The Subcontractor signed the MHT’s and did not raise a dispute until the end of the job. The Contractor requested the time change and CDOT thought it was a good idea and offered benefits and shortened the time.

Dispute#2: The Project was designed to use drums. The sites change about every 10 days. Work was on the Interstate and drums were chosen as the best way to delineate the closures and offer protection. There were 2 truck mounted barriers due to the dangerous areas and they wanted safety for the workers and the public. No permanent sign were required and the Subcontractor agreed with the MHT’s which showed temporary signs. At the pre-bid job showings, nothing was brought up on using cones.

Dispute#3: They would compensate for the mob of the beacons but they need documentation from the Subcontractor. They can’t pay based on the quote for the beacons. The Specs say that CDOT will not pay for loss of profit on eliminated items.

Dispute #4: The Contract was a Working Day Contract for 150 days. The Traffic Control Devices were paid for per Specs 630.15 and 630.16. CDOT paid the Contractor for TCM and TCI including the compensation for the fire delay which was not required by the specs. There is nothing in writing that CDOT said the equipment could not be removed from the site but it had to remain if needed for MHT’s.

**Contractor Summary**

The Contractor has paid the Subcontractor everything per the quantities that CDOT has paid the Contractor. The have paid the Subcontractor the hours over 10 hours for the TCS.

The Contractor worked when they could. They did not want to close and open the lanes if the weather forecast looked bad. The compensation for the fire was for Traffic Control.

The use of cones was brought up at the pre-construction conference not at the pre-bid. (CDOT agreed.)

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**Dispute #1: Extra Labor Cost – Change in Shift Times**

**Findings**

1. Spec 630.11 – Traffic Control Management, lists the following Traffic Control Supervisor (TCS) duties:

*(4) Coordinating project activities with appropriate police and fire control agencies.*

*(8) Overseeing all requirements covered by the Contract which contribute to the convenience, safety and orderly movement of traffic.*

*(10) Attend all project scheduling meetings.*

Spec 630.11 also states:

*A certified worksite traffic supervisor shall be responsible for Traffic Control Management (TCM) on a* ***24-hour-per-day basis*** (emphasis added). ….*Upon request of the Engineer, the TCS may be required to be on the project site at times other than normal working hours.*

2. Spec 630.15 – Method of Measurement, states:

*The quantity to be measured for Traffic Control Management will be the number of authorized 24-hour days of active TCM performed by the TCS or another representative certified as a work site traffic supervisor. Payment will be made for one day of Traffic Control Management regardless of the number of TCSs required to adequately control the work. An authorized 24-hour day of active TCM will be every calendar day on which active traffic control occurs in accordance with an approved MHT. Traffic control devices that are left in place during non-working hours….are not considered active traffic control.*

*The quantity to be measured for Traffic Control Inspection will be the number of authorized 24-hour days of active traffic control inspection (TCI) performed by the TCS or another representative certified as a work site traffic supervisor. An authorized 24-hour day of active TCM will be every calendar day that traffic control devices as shown in the MHT are in use….and the only traffic control activity is the inspection of the traffic control devices.*

*Payment will be made for either Traffic Control Management or Traffic Control Inspection for every calendar day that traffic control devices as shown in the MHT are in use, masked, or turned away from traffic on the project. Payment will not be made for both items for the same calendar day.*

3. Spec 630.16 – Basis of Payment, states:

*The accepted quantities will be paid for at the contract unit price for each of the pay items listed below that appear in the bid schedule.*

*Pay Item Pay Unit Traffic Control Management Day Traffic Control Management Day*

4. Per the Contract and Specs, the only pay item that CDOT is required to pay for where the TSC is concerned is a **day (24 hour period)** when TCS services are provided. Accordingly, all time that might be required for coordination, meetings and planning should be included in the Unit Price. The time periods shown in the Project Special Provision – Traffic Control Plan - General, relate only to the lane closure times and not times for setting up or removing all traffic control devices. Any added time for earlier closures was requested by the Contractor and approved by CDOT for the Contractor’s convenience at no additional cost. Accordingly, CDOT has no responsibility for the extra time for the TCS.

5. There is nothing in the Contract and Specs that requires additional Traffic Control labor beyond the TCS to be present on the jobsite for functions required to be performed by the TCS. The Subcontractor’s choice to have the laborers with the TCS was its sole decision. Accordingly, CDOT has no responsibility for the extra time for laborers.

6. There is nothing in the Contract and Specs that specifically requires a truck for the TCS; however, it can reasonably be inferred that on a project of this nature that a truck would be required. It should be noted that the Subcontractor’s Traffic Control Proposal dated 11/29/12 under NOTES states, *TCM based on 10 hours one truck, one TCS.*  During the hearing the Subcontractor made reference to the TCS driving the truck that set the Traffic Control Devices. Based on Finding 4 above, if the truck was required for TCS duties, it would have been coincidental to the TCS duties. Accordingly, CDOT has no responsibility for the extra time for the truck.

**Recommendation**

1. The Subcontractor’s request for additional payment for added hours for the TCS, laborers and the truck is without merit and is therefore denied.

**Dispute #2: Extra Labor Cost – Daily Setup and Takedown**

**Findings**

1. The only channelizing device shown in the Summary of Approximate Quantities, Plan Sheet Number 6, is Contract Item Number 630-80360 - *Drum Channelizing Device.* The same is true for the Tabulation of Traffic Engineering Items Table on Plan Sheet Number 8.

Note 1 on Plan Sheet Number 8 states, *See CDOT Revised Standard S-630-1 Case 5,6,7,8,10,12,13,and 26 for lane closures.* The Legend item marked ■ on the S-630-1 sheets states:

*Channelizing Device: For Type of Device to be Used, See Schedule of Traffic Control Devices Included in the Plans.*

There is no mention of Traffic Cones in the Schedule of Traffic Control Devices. Accordingly, the Subcontractor’s position that cones could have been used for the channelizing devices except at the lane tapers is not supported by the Contract Documents.

The Subcontractor’s position that since CDOT allowed traffic cones to be used for the lane closures to install the expansion joint glands, they should have been allowed to use cones for the channelizing devices except for the lane tapers is not a logical argument. The use of the cones was allowed by CDOT to assist the Subcontractor in safely moving the lane closures across the bridge approach to accommodate the expansion joint gland installation which had to be continuous and was of shorter duration than the nightly lane closures.

2. Spec 630.13 states:

*Portable construction traffic signs shall be removed when not required.*

Spec 630.13 also states:

*When storing portable signs or supports within the project they shall be removed beyond the clear zone and shall not be visible to traffic.* ***The minimum clear zone distance shall be 18 feet, measured from the edge of the traveled way*** (emphasis added). *If the signs cannot be stored at least 18 feet from the traveled way, they shall be removed.*

It can be reasonably inferred that any other Traffic Control Devices that are stored on the Project would have to meet the same storage requirements. Likewise, there is no way to store Traffic Control Devices on a bridge and meet the clear zone requirements. CDOT did allow storage behind guardrails. Accordingly, Traffic Control Devices that could not be stored beyond the clear zone or behind the guardrails had to be picked up and removed.

It is the Subcontractor’s obligation to provide a safe work environment and operation for its employees. If more than one laborer was required to safely and timely remove the traffic control devices, especially the drums, this was the Subcontractor’s responsibility and should have been a consideration in its bid.

3. Note 2 on Plan Sheet Number 8 states:

*Lane closures on I-25 & US 24 shall be limited to nightly construction activities and shall be removed at the end of each working day. Lane closures shall not be left in place during non-working hours.*

General Note 1 on Standard Plan S-630-1, Sheet No. 1 states:

*All construction zone traffic control devices, including but not limited to barricades, signs, arrow panels, flashing beacon (portable) and channelizing devices shall be….removed when temporarily not in use and returned when required, reset as necessary during the progress of construction.*

The Lane Closure details shown on Standard Plan S-630-1 include **all** the signage and other Traffic Control Devices. Based on Note 1 and Note 2 above, the lane closures (**all** the signage and other Traffic Control Devices) should have been removed at the end of each working day. This should not be construed to include the Portable Message Sign Panels as they are intended for information purposes and not necessarily lane closures.

CDOT’s position was that the use of permanent signs, other than for the “Work Ahead” signs when the flashing beacons were discussed, was not addressed by the Subcontractor until near the end of the Project. This was not refuted by the Subcontractor during rebuttal. Accordingly, the Subcontractor should have included all costs, including labor, associated with the daily set-up and removal of the Lane Closure Traffic Control Devices.

**Recommendation**

1. The Subcontractor’s request for additional payment for Extra Labor Cost – Daily Setup and Takedown is without merit and is therefore denied.

**Dispute #3: Overhead and Profit on Flashing Beacons**

**Findings**

1. Spec 109.05 – Eliminated Items, states:

*Should any items contained in the Contract be found unnecessary for the proper completion of the work, the Engineer will notify the Contractor in writing, to eliminate the item. Such action will not invalidate the Contract. The Contractor, by Contract Modification Order, will be reimbursed for actual work done and all costs incurred, including mobilization of materials and equipment prior to the elimination of the items.*

There is nothing in Spec 109.05 that entitles the Subcontractor to anticipated overhead and profit for the eliminated flashing beacons. CDOT had the right to eliminate the flashing beacons. CDOT stated at the hearing that they would need proof of the mobilization of the beacons and proof of equipment ownership if they will pay anything. Although the Subcontractor said during the hearing that he had mobilized the 22 beacons to the job site prior to the start of work, this was never brought up by the Subcontractor in the previous negotiations with CDOT.

2. The Subcontractor is entitled to payment for mobilization of the beacons per Spec 109.05.

**Recommendations**

1. In order for CDOT to consider payment for the eliminated flashing beacons, the Subcontractor shall submit the following items to CDOT within ten (10) business days of receipt of this Recommendation.

1. Proof of ownership of the flashing beacons prior to the start of the Project. Paid invoices are acceptable.
2. Daily Job Report copy or time card(s) reflecting the date and hours for mobilizing the flashing beacons. Copies of Certified Payroll(s) documenting the labor time and payment for the mobilization of the beacons. Documentation shall be acceptable to CDOT.
3. Cost of mobilization prepared in a Force Account basis per Spec 109.04. Any overhead and profit will only be that allowed by Spec 109.04.

2. If the Subcontractor cannot provide the items required in Item 1.b above or if the parties cannot agree on an adjustment, then an adjustment will be made….in such amount as the Engineer may determine to be fair and equitable per Spec 104.02(c).

**Dispute #4: Extra Days on Site for Equipment**

**Findings**

1. The Contract called for 150 Working Days. Working days are defined in Spec 101.93 as:

*Any day, exclusive of Saturdays, Sundays and holidays, on which weather and other conditions not under the control of the Contractor will permit construction operations to proceed with the normal working force engaged in performing those items controlling the completion of the work.*

Based on this definition, 150 Working Days equates to 30 work weeks. With two (2) days per weekend, this amounts to 60 non-work days during the Contract period. This appears to be the basis for the 150 TCM Days and 60 TCI Days shown in the quantities in the Contract Schedule of Bid Items. The Subcontractor agreed with this in their Pre-hearing Position Paper for Dispute 4.

2. The Subcontractor’s Pre-hearing submittal contained the Subcontractor’s Pay Application #10 from the Contractor for the period ending 12/16/13 and showed payment for 151 days of TCM and 161 days for TCI, for a total time on the job of 312 days. The Contractor’s Pay Estimate 10 for the period ending 12/15/13 shows 150 days for TCM and 161 days for TCI, for a total time of 311 days.

3. Spec 101.41 defines **Method of Measurement** as,*The manner in which a “Pay Item” is measured to conform with the “Pay Unit.”*

Spec 101.05 defines **Basis of Payment** as**,** *The terms under which “work” is paid, as a designated “Pay Item” in accordance with the quantity measured and the “Pay Unit.”*

Spec 630.15 states:

*Quantities to be measured for construction traffic control devices shall be the* ***number of units*** (emphasis added) *of the various sizes and descriptions listed below.*

*Construction Traffic Signs:*

*Panel Size A: Up to 9 Square Feet including Type 1 and Type 2 Barricades*

*Panel Size B: Over 9 to 16 Square Feet*

*Panel Size C: Over 16 Square Feet*

*Special: As shown on the plans*

*The total number of traffic control devices of each type on the schedule and approved*

*subsequent modified schedules shall be the maximum number approved for payment.*

*Traffic channelizing devices consisting of vertical panels, traffic cones, or drum*

*channelizing devices will be measured by the unit. Concrete barriers will be*

*measured by the linear foot. Barricades will be measured by the number used.*

*Barricade warning lights shall be furnished as a part of this item when required by*

*the Traffic Control Plan (TCP). Advance Warning Flashing or Sequencing Arrow*

*Panels will be measured by the unit according to size.*

Spec 630.16 states:

*Payment for the individual traffic control devices necessary to complete the*

*work shall be full compensation for furnishing, erecting, cleaning, maintaining,*

*resetting, repairing, replacing, moving, removing, and disposing of the construction*

*traffic control devices.*

Spec 630.16 goes on to state:

*The accepted quantities will be paid for at the contract unit price for each of the*

*pay items listed below that appear in the bid schedule.* (Only Items in the Bid Schedule are listed.)

*Payment will be made under:*

***Pay Item Pay Unit***

*Construction Traffic Sign (Panel Size \_\_\_ ) Each Advance Warning Flashing or Sequencing Arrow Panel Each*

*Drum Channelizing Device Each*

*Barricade (Type\_\_\_\_) (Temporary) Each*

*Traffic Control Management Day*

*Traffic Control Inspection Day*

*Flashing Beacon (Portable) Each*

The Summary of Approximate Quantities, Plan Sheet Number 6, and the Tabulation of Traffic Engineering Items Table on Plan Sheet Number 8 list the same Units.

4. Any contractor who performs on CDOT Working Day projects knows that holidays, weekend days and weather days are not included in the time count but are a part of the overall project duration. Spec 108.08(a)1 defines how working days will be counted where weather is a factor. A non-working day due to weather delays the completion date of the Contract but does not add to the working day time count. Spec 108.08(c)1 states:

***Excusable Delay*:** *A delay that was beyond the Contractor’s control and not caused by the Contractor’s fault or negligence, and for which a contract time extension may be granted.*

Spec 108.08(c)1.B goes on to state:

***Noncompensable Delay****: An excusable delay for which the Contractor may be entitled to an extension of contract time* ***but no additional monetary compensation*** (emphasis added)*.*

Accordingly, no additional payment is due the Subcontractor for weather delays. In addition, the Traffic Control Devices are paid for one time in accordance with Spec 630.16 for the quantity used regardless of the project duration unless the project is delayed by the Contractor, in which case the Contractor is responsible for the costs of the Traffic Control devices per Spec 630.16.

**Recommendation**

1. The Subcontractor’s request for additional payment for Extra Days on Site for Equipment is without merit and is therefore denied.

Respectfully submitted, this 14th day of June 2014.



W. H. Hinton II